

01-99007

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD J. BEARDSLEE,

Petitioner-Appellant,

v.

JILL BROWN, Warden,

Respondent-Appellee.

CAPITAL CASE

On Appeal from the United States District Court
for the Northern District of California
No. C 92-3990 SBA
The Honorable Sandra Brown Armstrong, Judge

OPPOSITION TO EMERGENCY APPLICATION FOR STAY OF EXECUTION

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

RONALD S. MATTHIAS
Supervising Deputy Attorney General

DANE R. GILLETTE
Senior Assistant Attorney General
State Bar No. 65925

455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5866
Fax: (415) 703-1234

Attorneys for Respondent-Appellee

01-99007

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD J. BEARDSLEE,

Petitioner-Appellant,

v.

JILL BROWN, Warden,

Respondent-Appellee.

CAPITAL CASE

In *Beardslee v. Woodford*, 358 F.3d 560 (9th Cir. 2004), this Court affirmed the denial of habeas corpus relief from Beardslee's murder convictions and death sentence. After granting an expanded Certificate of Appealability (COA), the Court issued a supplemental opinion on December 29, 2004, denying relief on the additional issue. *Beardslee v. Brown*, ___ F.3d ___, 2004 WL 3019188 (9th Cir. 2004). On January 6, 2005, the Court denied rehearing and rehearing en banc. Beardslee now requests a stay of execution, scheduled for January 19, in order to file a petition for writ of certiorari. The application should be denied.

“Stays of execution are not automatic pending the filing and consideration

of a petition for writ of certiorari” following denial of a petition for writ of habeas corpus. *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983). In order to obtain a stay Beardslee must demonstrate: (1) a reasonable probability that four Justices of the Supreme Court would consider the underlying issues sufficiently meritorious to grant certiorari; (2) a significant possibility of reversal of this Court’s decision; and (3) a likelihood of irreparable harm if the proceedings are not stayed. *Id.* An appellate court must undertake this three-part analysis before staying an execution. *Netherland v. Tuggle*, 515 U.S. 951 (1995). Although Beardslee claims to have met all three requirements, he has not.

Beardslee first contends that he has met the reasonable probability test because this Court issued the expanded COA. While the Supreme Court held in *Slack v. McDaniel*, 529 U.S. 473, 483-484 (2000) that the statutory test for issuing a COA in 28 U.S.C. § 2253(c) is a codification of the standard for issuing a certificate of probable cause (CPC) set forth in *Barefoot*, the Court has never equated either the CPC or COA standard with the showing necessary to obtain certiorari. The fact that a claim was sufficiently debatable among reasonable jurists to warrant further review on appeal does not establish a reasonable probability that at least four members of the Supreme Court would grant certiorari. That is particularly true in this case.

Beardslee sought a stay of mandate and expanded COA to determine whether he was entitled to relief under this Court's decision in *Sanders v. Woodford*, 373 F.3d 1054 (9th Cir. 2004). Explicit in that request was his contention that error in the penalty jury's consideration of three special circumstance findings later vacated on appeal had a substantial and injurious effect on the verdict within the meaning of *Brecht v. Abrahamson*, 507 U.S. 619 (1993). The expanded COA was granted because reasonable jurists could debate the prejudicial effect of the of the invalid special circumstances under the *Brecht* standard. *Beardslee v. Brown*, ___ F.3d ___, 2004 WL 2965969 (9th Cir. 2004). Beardslee now alleges, however, that he will seek certiorari on whether the test in *Brecht* or the reasonable doubt standard of *Chapman v. California*, 386 U.S. 18 (1967) should apply in habeas corpus when the state court is found to have conducted an inadequate harmless error review, an issue that did not occur to him until the petition for rehearing. Because that claim was *not* before the Court when it issued the COA, nothing in that order is relevant to whether a stay to seek certiorari is appropriate.

Beardslee next insists that a reasonable possibility exists this Court's decision will be reversed based on his newly developed claim that *Chapman* rather *Brecht* should apply to the harmless error analysis. He bases this prediction

on a split of authority among the circuits. While he correctly observes that the Eighth Circuit adopted the position he espouses in *Orndorff v. Lockhart*, 998 F.2d 1426 (8th Cir. 1993), he fails to note that every other court to reach the issue, including this one, has taken the opposite view and applied *Brecht* to all harmless error analysis in habeas corpus cases. *Bains v. Cambra*, 204 F.3d 964, 976-977 (9th Cir. 2000). There is, in fact, little real conflict among the circuits, and the minor one that exists is of little practical import.^{1/}

Finally, Beardslee asserts that he should be allowed to seek certiorari before the issue becomes moot by his execution. He makes no showing of inability to file a petition and stay application in the Supreme Court. After more than twenty years of litigation in both state and federal court the time has come to execute the judgment returned by the jury and pronounced on Beardslee in 1984.

1. At least one circuit has apparently found it unnecessary to resolve the conflict. *See Fortini v. Murphy*, 257 F.3d 39, 48 (1st Cir. 2001).

CONCLUSION

For the reasons stated above, the application for stay of execution should be denied.

Dated: January 11, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

RONALD S. MATTHIAS
Supervising Deputy Attorney General

A handwritten signature in black ink, appearing to read "Dane R. Gillette", with a stylized, cursive script.

DANE R. GILLETTE
Senior Assistant Attorney General

Attorneys for Respondent-Appellee

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **DONALD J. BEARDSLEE v. JILL BROWN, Warden**

No.: **01-99007**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On January 11, 2005, I served the attached

OPPOSITION TO EMERGENCY APPLICATION FOR STAY OF EXECUTION

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, California 94102-7004, addressed as follows:

Michael Lawrence
Habeas Corpus Resource Center
50 Fremont St., Suite 1800
San Francisco, CA 94105

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 11, 2005, at San Francisco, California.

PEARL LIM

Declarant



Signature